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SUBJECT: CANADA SEEKS MORE ANTI-TERRORIST TOOLS

REF: A. OTTAWA 338
- B. OTTAWA 198
- C. OTTAWA 079
- D. 08 OTTAWA 1578
- E. 08 TORONTO 286
- F. 08 TORONTO 114

¶1. (SBU) Summary: The federal government has begun a new legislative push to restore two anti-terrorism tools -- investigative hearings and preventive arrest -- that lapsed in 2007. Separately, the government has introduced a bill to allow victims of state-sponsored terrorism to sue the perpetrators in Canadian courts. The bill also mandates that the government create a list of foreign states that sponsor or support terrorism. End summary.

LIBERALS ON SIDE, SECOND TIME AROUND

¶2. (U) The federal government is again moving to restore two anti-terrorism tools -- investigative hearings and recognizance with conditions (preventive arrest) -- that lapsed in February 2007 under sunset provisions in the 2001 Anti-Terrorism Act (ATA). The House of Commons began debate on the bill (C-19) to amend the ATA on June ¶8. The bill is the government's third attempt to reinstate the provisions, which security officials could use to disrupt imminent terrorist attacks or gather information about an attack that had or would have been committed. In debate on June 9, Liberal Public Safety critic Mark Holland confirmed that Liberal MPs support the government's bid to refer the bill to a lower house committee before a late June recess, although they will work to amend it in committee better to balance civil rights. Overall, however, Liberal MP Larry Bagnell agreed his caucus is "very supportive of the concepts of the bill."

A BITTER HISTORY

¶3. (U) The ATA, which the then-Liberal government brought into law in December 2001 in the wake of the 9/11 attacks, included investigative hearings and recognizance with conditions. At the time, human rights groups and some politicians claimed that the legislation went too far in restraining civil liberties. As a result, the government agreed to a five-year sunset clause on the new powers. In a bitter debate in the House of Commons in February 2007, Liberal MPs combined with the other opposition parties to defeat the minority Conservative government's motion to extend the powers. Then-Liberal Party leader Stephane Dion argued that the powers were no longer necessary and posed too great a risk to civil liberties.

¶4. (U) The Conservatives pledged to restore the powers, calling them "important tools" to enable law enforcement agencies to anticipate and respond effectively to terrorist threats. In October 2007, the government, unusually, introduced the bill in the Senate rather than the lower house. The government said the tactic reflected its desire to de-politicize the issue as well as to draw on the Senate's expertise in conducting a mandatory review of the ATA. The bill reinstated the two expired powers in a substantially similar form as they had existed in the 2001 ATA, but added new safeguards for civil

rights. The Senate passed the legislation on March 6, 2008 and it moved to the House of Commons, which was not able to act upon it before the dissolution of Parliament for the October 2008 federal election.

15. (U) The re-elected Conservative minority government reintroduced the current bill in March 2009, this time in the House of Commons. It is almost identical to the previous version, but with the extra provision that Commons and Senate committees could conduct a comprehensive review of the use or continuing need for the clauses (although their recommendations would not be binding on the government).

BALANCING SECURITY WITH CIVIL RIGHTS

16. (U) Investigative hearings compel a person with information or materials about a past or future terrorist offense to appear before a judge and answer questions or provide material. The purpose is to gather information, not to prosecute. The hearings are limited to cases where reasonable grounds exist to believe that a terrorism offense had been or would be committed. A police officer must obtain the consent of the Attorney General to invoke the tool and apply to a provincial court or higher court judge of a superior court for an order for the hearing. The person compelled to appear has the right to counsel at any stage of the proceedings. A witness who evades the order, or is deemed by authorities about to abscond, can be arrested without warrant and detained for up to thirty days for the purpose of giving evidence at the hearing. The information gained from the person cannot be used against him or her in any criminal proceeding, except for perjury. An additional safeguard in

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the bill requires police to satisfy the judge that "reasonable" attempts have been made to obtain the information by other means.

17. (U) Recognizance with conditions (preventive arrest) gives the police the authority to arrest a person without a warrant to disrupt nascent terrorist activity and prevent aQ,%>|Qfer. A detained person must be brought before a judge within 24 hours of his/her arrest or "as soon as possible" up to a maximum of 72 hours of detention before a hearing. If the judge is satisfied that reasonable grounds for suspicion exist, the person could be required to enter into a recognizance of conditions or conditional commitment (such as having no contact with specified persons). The person could be imprisoned for up to 12 months if he/she refuses to enter into the recognizance.

18. (U) The bill includes another five-year sunset clause for both provisions, as well as new annual reporting rules for the Attorney General and the Minister of Public Safety to report to Parliament on use of the powers, as well as their justification for extending the provision.

19. (U) The two powers were never used when in force between 2001 and 2007. In 2004, the Supreme Court of Canada ruled investigative hearings constitutional when it upheld an order for a hearing arising from the Air India terrorist trial. However, the hearing never took place, as the trial ended before the Court delivered its ruling.

SECURING CONVICTIONS

10. (U) The government has secured two convictions and one guilty plea under the ATA (reftels):

-- an Ontario court convicted Momin Khawaja in October 2008 of participating in terrorist training, financing, and facilitating terrorism for his role in a conspiracy to bomb sites in London, U.K. In March, the judge sentenced him to ten-and-a-half years imprisonment, with no chance of parole for five years. Khawaja was

the first Canadian to be charged under the ATA;

-- a Toronto court convicted one youth (whose identify was publicly protected under Canadian laws due to his age) in September 2008 of participating in a terrorist activity and sentenced him in May 2009 to two-and-a-half years imprisonment. With credit for time served since his arrest in June 2006, he was freed immediately, but on probation. Another youth pled guilty in May 2009 to the same charge and is awaiting sentencing. Both were members of the "Toronto 18," whom police arrested in June 2006 for allegedly conspiring to attack Parliament and politicians as well as to bomb the Toronto offices of CSIS, the RCMP, and CBC. Police have stayed charges against three youths and four adults in the case, but nine other adults are awaiting trial; and,

-- Moroccan-born Said Namouh came to Canada in 2003 and was arrested in September 2007. He is currently in custody pending trial on charges of creating and distributing jihad propaganda, and four charges related to plotting terror attacks in Canada and Austria. His bid to have the propaganda charges against him dropped on the grounds that they infringed on his constitutional right to freedom of speech failed on June 10, when a Montreal judge upheld the constitutionality of the ATA.

LIFTING STATE IMMUNITY FOR SUPPORTERS OF TERRORISM

¶11. (U) In June, the government introduced a "Justice for Victims of Terrorism" bill (C-35) to complement existing counter-terrorism "Q Terrorism" bill (C-35) to complement existing counter-terrorism measures and to allow victims of terrorism to sue perpetrators and supporters of terrorism. The proposed bill would lift the immunity of foreign states that the government designates as terrorism supporters. The bill also establishes a listing mechanism for state sponsors of terror. If the bill becomes law, the Minister of Foreign Affairs, in consultation with the Minister of Public Safety, would advise the government on the establishment of the list.

¶12. (U) The legislation would allow victims of terrorism who can demonstrate a "real and substantial" connection between their case and Canada to sue in a Canadian court those foreign states included on the government's list. Plaintiffs would be able to seek redress for terrorist acts committed anywhere in the world on, or after, 1 January 1985. Successful convictions could result in seizure of assets and property. For claims related to terrorist acts committed outside Canada, plaintiffs would have to give the foreign state in which the incident occurred "reasonable opportunity" to submit the

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dispute to arbitration in accordance with accepted international rules of arbitration before applying to a Canadian court. In tabling the legislation, Minister of Public Safety Peter Van Loan insisted that Canada is sending a "clear message" that perpetrators of terrorism and their supporters will be held accountable.

COMMENT

¶13. (SBU) Thus far, the debate on the ATA amendments has been uncontroversial and, crucially, the Liberals appear supportive. Debate on C-35 has not yet begun. Under new leader Michael Ignatieff, the Liberals have been careful quietly to support the robust Conservative anti-crime agenda in order to deprive the Conservatives of a wedge issue in the next election. Similarly, they are unlikely in principle to oppose, or substantially modify, the anti-terrorism bills. The biggest worry now is whether the bills -- notably the ATA amendments -- can make it through both houses of Parliament before Canada faces another election, in which case the draft legislation would again die and the next government would face the choice of yet another re-introduction.

BREESE